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IN THE

**Supreme Court of the United States**

**October Term, 1960**

SAM FOX PUBLISHING COMPANY, INC., ET AL.,

*Appellants,*

v.

UNITED STATES AND AMERICAN SOCIETY OF  
COMPOSERS, AUTHORS AND PUBLISHERS,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR APPELLEE  
AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS**

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March 1961.

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**BRIEF FOR APPELLEE  
AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS**

This appeal should be dismissed for lack of jurisdiction.  
If not so dismissed, the order below should be affirmed.

**Questions Presented**

Appellee American Society of Composers, Authors and Publishers (hereafter "ASCAP" or "the Society") submits that the questions presented are not as stated by appellants but are the following:

- (1) The preliminary question of jurisdiction is whether an order of a district court denying a motion

to intervene as of right filed pursuant to Rule 24(a)(2) in connection with a motion in an antitrust suit by the United States, may be appealed to this Court as "the final judgment of the district court" under Section 2 of the Expediting Act (32 Stat. 823, 15 U.S.C. §29), when appellants did not appeal from the final judgment which had been entered before they filed their notice of appeal from the order denying intervention.

(2) The substantive question is whether three of the 6,457 members of an unincorporated association may intervene as of right when the Government and the association, who are the sole parties to a consent judgment in an action by the United States under the Sherman Act, jointly present a consent further amended judgment and

(1) the judgment being amended and the proposed judgment both run only against the association as a juridical entity (R. 35-48, 667-680)\*;

(2) the District Court had invited all members to present their views as *amici curiae* and appellants participated at length in this capacity (R. 75-76, 365-408, 481-484, 570-580);

(3) the amended judgment was expressly conditioned upon its being approved by a vote of the membership, and was so approved (R. 679-680);

(4) appellants do not claim that the provisions of the amended judgment injure them in any way (see pages 12, 15, 30, *infra*);

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\* For the convenience of the Court, we adopt appellants' referencing. Thus, the printed record is referred to as "R." The record in the District Court which was not printed is referred to as "DR." The subcommittee hearings lodged by appellants with the Clerk—and which are not part of the record—are referred to as "ASCAP Hearings, p." Pages in appellants' brief are referred to as "App. Br."

(5) the effect of intervention would be to give appellants the right to veto the proposed consent amended judgment approved by a majority of the members (see Point III, *infra*); and

(6) appellants conceded below that the Court, in its consideration of the proposed consent amended judgment, could not require the Government or ASCAP to consent to a different judgment which appellants might prefer (R. 371-372, 405).

### **Statement**

The consent further amended judgment of January 7, 1960, was entered by Chief Judge Ryan in an antitrust suit begun in 1941. A summary of prior events and proceedings will help to put the latest judgment in its proper context.

### **Description of Appellee ASCAP**

Before the organization of ASCAP in 1914, there were no effective means by which the writers and publishers of music could secure payment for the use of their copyrighted musical works in public performances for profit. The users of music were so numerous and widespread that no individual writer or publisher could take the measures necessary to discover them or employ counsel to secure redress for unauthorized use. Moreover, users who wished to pay could not find a practical means of obtaining licenses from the owners of the thousands of copyrighted works which each of them performed annually.

As a means of solving the problems of both the creators and users of music, ASCAP was organized as an unincor-

porated membership association representing both writers and publishers, who grant to ASCAP a non-exclusive right to license the public performance of copyrighted musical works that they have composed or published. The writers and publishers are treated as joint owners of the performing rights, and the Society's revenues are divided equally between these two groups. The writers and publishers have equal representation on the Board of Directors, each electing 12 members of the Board.

The users of music are unwilling and often unable to keep records of all the works performed by them, or to account separately for each use. Therefore, the most practical procedure is for ASCAP to grant each user a non-exclusive license to perform all of the compositions in its repertory, and Section VI of the 1950 amended consent judgment so provides (R. 41). However, where individual licensing is feasible, such licenses are negotiated directly between the individual writers and publishers and the user; the Society may not engage in individual licensing unless requested to do so by both the user and the member whose work is involved (R. 41).

Thousands of users of music, engaged in giving many millions of performances annually, pay flat amount royalties to ASCAP for the use of its entire repertory. These revenues must be distributed by ASCAP among more than 6,000 members on the basis of the relative value of each member's contribution to the repertory. The prior consent judgments in this case, and the further amended consent judgment of January 7, 1960, contain provisions concerning the apportionment of these revenues and related matters.

### **Government's Suit**

In 1941, the Government brought an antitrust action directed to ASCAP's dealings with its licensees. This complaint is conceded to be irrelevant to this appeal (App. Br. 6), except for the one clause which alleged that ASCAP had a self-perpetuating board of directors with exclusive power to control the activities of the Society (R. 16). Paragraph 8 of the prayer for relief in 1941 asked that the directors be elected by a membership vote\*, and paragraph 9 asked that ASCAP be required to distribute its receipts among the members on the basis of the number, nature, character and prestige of their respective works, their length of membership in ASCAP, and the popularity and vogue of their works, all to be determined in a fair and non-discriminatory manner (R. 26).

The 1941 consent judgment (R. 27-35), which was entered without trial, dealt primarily with relations between ASCAP and its licensees. In two subparagraphs, the judgment adopted the prayer for relief with respect to voting and distribution of royalties, including in the voting provision language permitting the Society to weight the number of votes of its members on the basis of their respective classifications within the Society (R. 32-33). Thus, the 1941 decree achieved all of the relief sought in the complaint on these two matters.

In 1950, the Government and ASCAP proposed and the District Court entered an amended final judgment, again upon consent and without trial (R. 35-48). Again, the judgment was concerned mainly with the relations be-

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\* By 1941, ASCAP's membership had grown to 1,340 members (R. 9).

tween ASCAP and its licensees. However, there were additional provisions dealing with voting and distribution of royalties among the members (R. 44-46). Jurisdiction was retained to permit the parties, i.e., the United States and ASCAP, to seek construction or modification of the judgment. It was specifically provided that after five years the United States could apply for a modification of the judgment in any respect. Jurisdiction was not retained for the purpose of permitting any of the members to seek modification of the judgment (R. 47-48).

Thereafter, certain members of the Society expressed complaints to the Department of Justice with respect to the voting and distribution systems of ASCAP (R. 304). Appellants complained to the Small Business Subcommittee of the House of Representatives.

Such complaints were inevitable. At the time of the hearings below, ASCAP had 6,457 members with music catalogues of varying types, sizes and popularity. The majority of the writer members received less than \$510 per year in royalties\* from ASCAP because their works were relatively infrequently performed (see ~~Ex.~~ H; R. 655, 556), while the songs of Irving Berlin, Cole Porter, Richard Rodgers, Oscar Hammerstein and other popular and prolific writers received a much larger share of the performances. The majority of the publisher members earned less than \$750 per year in ASCAP royalties (see Ex. H; R. 655, 556), while the catalogues of ten groups of publishers contained the songs which received about two-

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\* Publishers with one vote received less than \$750, on the basis of one vote for each \$500 or major fraction thereof. Writers with 25 votes or less received less than \$510, on the basis of one vote for each \$20 or major fraction thereof (R. 501, pp. 2-3).



thirds of all performances of the Society's repertory (R. 321).

The Society's board of directors is composed of 24 members, twelve of whom are elected by the writer members (composers and authors) and twelve by the publisher members. Votes were allocated among the members in proportion to the value of the catalogues they contributed to the Society as determined by their share in the Society's royalties (R. 319).

There were those, however, including appellants, who have urged that voting be on a per capita basis (see App. Br. 55n.; DR. 1106, 1107, 1143, 1144; ASCAP Hearings\* pp. 53, 346). It has even been suggested that a large part of ASCAP's revenues be distributed on a per capita basis (R. 475-6).\*\*

The distribution of revenues takes into account not only the frequency of performance of the various musical compositions in the Society's repertory, but also the nature of the composition and type of use. In addition to the fa-

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\* In their Jurisdictional Statement, appellants stated that "[n]o issues of fact are involved in this appeal" (p. 13). However, after this Court entered its order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits, appellants lodged with the Clerk copies of hearings before a Congressional subcommittee, a report of the subcommittee, and documents from the files of the subcommittee, none of which is part of the record (App. Br. 1-2, 45). The unsworn statements of appellants before the subcommittee, together with appellants' briefs in the District Court, constitute their principal citations of "facts" in this Court.

\*\* See also ASCAP Hearings, p. 390, where Mr. Lengsfelder (of appellant Pleasant Music) suggested that a part of ASCAP's distributable revenue be distributed solely on the basis of length of membership, irrespective of performances.

miliar songs and orchestral works, musical scores or fragments are written solely as background for essentially non-musical entertainment such as motion pictures or television dramatic presentations. Music specially written for background use is not normally played elsewhere. On the other hand, familiar songs and orchestral works are sometimes also used as background music where, because of their familiarity, they can, for example, effectively contribute to the story line of a dramatic presentation.

ASCAP treats all feature uses of music\* as having equal value (R. 690, 706). Its weighting formula recognizes, however, that in non-feature uses, well-known works have a greater value than those which have not won public recognition by prior repeated feature uses (R. 706-711). Appellants, on the other hand, would have ASCAP ascribe to a few bars of music newly put together as atmospheric background music the same value it ascribes to a familiar song used because the audience will associate its well-known words with the action being depicted. The use of "Give My Regards to Broadway" to set a street scene in Times Square, or the use of "White Christmas" or "Easter Parade" to identify the time of the year, illustrates the added value to the user of such familiar works.

A further complaint of appellants concerned the means by which ASCAP identifies the music performed by its licensees. ASCAP had agreed in the 1950 judgment that it would make objective surveys of performances (R. 44). Whether they actually met modern survey standards became a matter of dispute.

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\* Uses other than as themes, jingles or background, cue or bridge music (R. 689-690).



Familiar with these and other complaints, the Department of Justice advised ASCAP that it would seek modification of the 1950 consent judgment unless agreement could be reached to make certain provisions of the judgment more specific (R. 304). The Society retained special counsel to conduct the discussions with the Department and to present the proposed amendments to the membership (see R. 583-584).<sup>\*</sup> Lengthy investigation and discussion resulted in agreement on a consent further amended judgment containing detailed provisions governing ASCAP's distribution of votes and royalties among its members (R. 304-305).<sup>\*\*</sup>

#### **The Proceedings in the District Court**

When the parties presented the proposed consent further amended judgment to the District Court, they requested that notice be given to each of the members of the Society so that all members could express their views to the Court (R. 51-52). The proposed judgment also provided that it would not become effective until the members voted, in accordance with the Society's Articles of Association, to approve those provisions which required membership approval (R. 679-680).

Pursuant to an order of Judge Ryan dated June 29, 1959, members were given notice of a hearing to be held

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<sup>\*</sup> One of appellants' principal arguments in this Court, which it does not attempt to document, is that special counsel represented only the Board of Directors and not the Society or its membership at large (e.g., App. Br. 27, 30). Appellants' view was not shared by the Department of Justice, the District Court, or the membership of the Society (see R. 583-584, 586, 666).

<sup>\*\*</sup> Appellants express no complaint about the other provisions of the 1960 amended judgment, and they are therefore not discussed in this brief.

on October 19, 1959, and they were advised that they might appear at such hearing and "make application to be heard upon the ground that the proposed consent further amended final judgment will not accomplish the antitrust purpose of this suit" (R. 75-76). Copies of the 1950 judgment and the proposed further amended judgment were mailed to each of the members (R. 76-78; see R. 292). Thereafter, the Society sent to its members a memorandum of the Society's counsel summarizing the proposed judgment (R. 81-97; see R. 292), together with the press release of the Department of Justice (R. 98-100; see R. 292).

Membership meetings were then held in Los Angeles and New York to discuss the proposed judgment. At each meeting, counsel explained to the members present the provisions of the proposed amended judgment, and these explanations were mailed to each of the members for the benefit of those who did not attend the meetings (R. 149-187, 188-228; see R. 292).

One of the subjects of discussion with the Department of Justice was the Society's survey of performances. At the recommendation of special counsel, the Society retained Dr. Joel Dean of Columbia University to redesign the ASCAP survey of performances (R. 346-347). This design was reviewed by the Department of Justice, and, as modified by the Government's own experts at the Bureau of the Census, the major principles of the new survey were incorporated in the proposed amended judgment (R. 314, 668-670). A memorandum of Joel Dean Associates explaining the new survey was sent to all of the members before the hearing on October 19, 1959 (R. 230-243; see R. 292).

All of the foregoing documents were filed with the court, together with the correspondence with members, including appellants, requesting information about the proposed amended judgment (*e.g.*, R. 262-291; see R. 292).

On October 19 and 20, 1959, the proposed amended judgment was presented and explained to the District Court, and, in response to his invitation to those members who questioned the proposed judgment (R. 75-76), Judge Ryan heard, as *amici curiae*, four members appearing *pro se* and nine lawyers representing approximately 225 members of the Society (R. 292-301; 317-318; 351-453; 474-488; 562-583; 586-588).

Appellants had moved to intervene prior to the hearings on October 19 and 20, 1959 (R. 251). Instead, they were given full opportunity to participate and present their contentions as *amici curiae* (R. 365-408; 481-484; 570-580).

The provisions of the proposed judgment which appellants have discussed are:

Section II, which requires ASCAP to conduct a scientific survey of performances (R. 668-670).

Section IV, which provides for the number of votes each publisher member shall have (R. 674-676).

Paragraph (B) of the Weighting Rules attached to the judgment and referred to in Section III(F) (R. 674; 690-693).

### **The Survey**

At the hearing on October 19 and 20, 1959, Mr. O'Donnell and Mr. Bennett of the Department of Justice presented the proposed amended judgment to the Court.

Mr. O'Donnell pointed out that the 1950 judgment merely required that ASCAP conduct "objective" surveys and that the Government had been kept fully informed of the manner in which ASCAP was complying with the 1950 judgment (R. 307). He also pointed out that although the new survey design had been approved by the Government's own experts at the Bureau of the Census, the proposed judgment provided that the Court should appoint a competent outsider periodically to review the design and operation of the survey and to report thereon to the Court and the Department of Justice, and that the Government reserved the right to reopen the survey provision after 18 months' experience (R. 314, 669-670).

Appellants suggested that ASCAP be required to put the conduct of the survey in the hands of some outside agency (R. 254, 387). This suggestion did not receive favor with the Court, the Department of Justice or ASCAP (R. 454, 663-664). However, the judgment does not prevent ASCAP's using an outside agency to conduct the survey if the members prefer it (R. 668), and appellants conceded that, as to the new survey design, the Joel Dean survey "is all right, sure. That is an improvement" (R. 386).

### **Voting**

Mr. O'Donnell discussed the difficulty the Department would have in seeking a litigated change in the ASCAP voting procedures (R. 318-323). The Department had been advised of the voting formula adopted by ASCAP after the entry of the 1950 judgment, and the Department's

acquiescence was evidence that the voting formula was consistent with the intent of the 1950 judgment.

Mr. O'Donnell pointed out, however, that ten groups of publishers had 63 per cent of the eligible publisher votes and that, if they acted in unison, they could elect all the publisher members of the Board of Directors. The proposed judgment provided for a very substantially revised allocation of votes. Instead of the previous arrangement whereby votes were allocated on the basis of the value of each member's catalogue, the new judgment provided that votes would be based on each member's performance credits, and that an increasing number of performance credits would be required for each additional vote (R. 674-675). Thus, Mr. O'Donnell pointed out, these ten publisher groups, with about two-thirds of the performances, would be reduced to 37 per cent of the publisher votes (R. 320-321), and the aggregate voting strength of the publisher members then represented on the Board of Directors would be reduced from 56 per cent to 30 per cent of the eligible publisher votes (R. 320).

There was also a new provision allowing any group of writer or publisher members representing 1/12th of the total writer or publisher votes to elect a director by petition in advance of the general election (R. 320, 676). This would permit the election of individual directors by any substantial group in the Society, and, in fact, two publisher directors were elected by petition in the 1960 elections (App. Br. 48n.).

Addressing himself to the question why the Government did not demand one vote for each member, Mr. O'Donnell stated that the Government "gradually came

to believe that it wouldn't be appropriate or fair to go any further" (R. 321). To his own question: "Shall we have ASCAP run by a numerical majority with only a tiny fraction of the performances, or shall we have it run by a numerical minority which has a vast majority of the performances?", Mr. O'Donnell stated that the Government thought the new judgment strikes a balance (R. 322) and "that a prayer for equalizing of votes would be equivalent of a prayer for dissolution" (R. 323) because the members whose music represents the greatest part of the value of the ASCAP catalogue would not stay in a society in which they had no voice (R. 322).

Mr. O'Donnell made a further and very relevant observation:

"If the new judgment goes into effect, all these charges about a board of directors which is bent on ruining small members are going to fade in importance. The new judgment circumscribes very sharply what the board of directors may do in the area of distribution, surveys and grievance procedures with the result that its power to do the kind of harm that offends the antitrust laws is going to be very much curtailed if not eliminated." (R. 323)\*

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\*Appellants, in their discussion of the voting provisions, completely ignore the fact that ASCAP is managed by a board of 24 directors, 12 of whom (including the President) are writers and are elected to the board by the writer members. No one has ever charged that any writer or group of writers can be elected except with broad support of the general writer membership. Voting power among the writer members was widely dispersed before the 1960 judgment and is even more widely dispersed now.



Appellants conceded that the new formula for weighting votes was at least some improvement over that previously in effect (R. 374, 379). Moreover, the amended judgment only permits and does not require the Society to weight the votes of its members (R. 674).

### Weighting

The last provision which appellants discuss deals with the different weight given to well-known works and to those works which are not well known, when used as themes or background music. Such distinctions have been made, with the knowledge of the Department of Justice, at all times after the entry of the 1950 judgment. Mr. Bennett, speaking for the Department of Justice, described this as being in accordance with "the inherent value of the music itself." \* (R. 332)

Appellants concede that the provisions of the amended judgment respecting weighting constitute an improvement (R. 397). Moreover, the amended judgment leaves the Society discretion to make changes in the weighting formula such as those appellants desire (R. 690-693).

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\* The necessity of such a rule was clearly demonstrated to the Department of Justice by examples mentioned in appellants' brief (p. 52<sup>11</sup>). In 1958, 12 compositions used as background music and theme songs together had more performance credits than the entire catalogues of Irving Berlin and Oscar Hammerstein. None of these songs had any popularity as measured by feature performances (R. 147). One of the objectives of the new weightings was to insure that full credit for background or theme use would be awarded only to works which historically had, and continued to have, substantial popularity as indicated by repeated feature performances (see R. 690-693).

### **The Membership Approval**

At the conclusion of the hearings, the Court suggested that a vote be taken of the members to see whether they approved the new judgment (R. 471), and this proposal was endorsed by counsel for the appellants (R. 476). The Court then directed that the vote be tabulated on a *per capita* basis as well as on the basis of the weighted vote which each member had under the Society's Articles of Association (R. 484). Provision was made for the Society to pay up to \$1,000 for printing and mailing literature of appellants and others soliciting the members to vote "no" (R. 481-482). The hearing was then adjourned to January 6, 1960.

Appellants and others solicited the membership to vote against the proposed judgment (Exs. C-1 through F of Ex. D; R. 608-619, 551) for a variety of different and conflicting reasons (e.g., Exs. A-1, D-1 of Ex. D; R. 607, 612, 551). The Board of Directors recommended an affirmative vote (Ex. L of Ex. D; R. 649, 551). Membership meetings were held in Los Angeles and New York, and all members were given a full opportunity to express their views (R. 493-496; see R. 292). Explanations of the proposed judgment were again mailed to all of the members (Ex. K of Ex. D; R. 631-648, 551).

Judge Ryan entered an order designating an independent firm of accountants to supervise the balloting, with special provision for secrecy of the ballot (R. 503-508). He also directed that the ballots be tabulated in several classes according to the members' participations in the Society (R. 507-508). The ballots were opened and tabulated in the courtroom in the view of the Court and the attorneys for appellants and other members (R. 536-560).



Weighting the votes as provided in the Society's Articles of Association, the proposed judgment was approved by 81.75 per cent of the writer votes eligible to be cast and by 84.30 per cent of the publisher votes eligible to be cast (Ex. H; R. 655, 556).

On a *per capita* basis, 3,629 members cast their votes in favor of the proposed judgment and 1,725 members voted against.\*

Of the eight classes of writer members and the six classes of publisher members, graduated according to size, a majority of the members voting in each class voted to approve the judgment (Ex. H; R. 655, 556).

At the request of the Government, with the consent of ASCAP, and with the approval of the membership, the Court entered the consent further amended final judgment on January 7, 1960, stating in his opinion:

"The proposed judgment has been consented to by the attorneys for ASCAP with the unanimous approval of the Board of Directors as in their judgment accomplishing the best possible results for the Society as a whole and for its individual members. It is also the belief of the Antitrust Division that the decree is the best that today can be devised and framed; it recommends approval by the Court without qualification.

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\* Of the 6,457 members, 1,103 did not vote. Appellants use these uncast ballots to state that the judgment was approved by only 56% of all members and only 47.7% of all publisher members entitled to vote (App. Br. 15n.). It is equally true that less than 27% of all the members and less than 33% of the publisher members entitled to vote, voted against the judgment.

Moreover many who voted against the judgment wanted no change at all in the existing system (*e.g.*, Ex. A-1 of Ex. A; R. 607, 551) rather than the changes appellants wanted and did not get.

After careful consideration by the Court of the arguments for and against the approval of this proposed consent judgment, the Court finds that although not a panacea for all the alleged ills besetting the Society, the decree does represent definite improvement over existing procedures and that it will serve to advance the antitrust purposes of the Government suit and of the prior decrees." (R. 666)

On the same day, the Court signed an order appointing a former New York Supreme Court justice and a former United States senator to examine periodically the design and conduct of the survey and to report to the parties and the Court (R. 661-662). (The senator could not accept his appointment because of illness.)

#### **The Motion to Intervene**

Appellants' pleading in intervention, filed in support of their motion to intervene, prayed that the judgment be rejected by the Court and that any modified decree approved by the Court include different provisions (R. 258):

At the hearing, appellants did not claim that the provisions of the proposed amended judgment would injure them. Although attempting to minimize its advantages, appellants conceded that the changes made by the new judgment were for the better (R. 374, 379, 386, 397).

Appellants did not seek rejection as an end in itself. They suggested instead that, although there were no issues framed, the District Court should tell the Department to seek a different judgment more to appellants' liking (R. 372-373). Judge Ryan pointed out that he could not compel either party to consent to a judgment different from the

one presented on consent, and that he could not do so "indirectly, without hearing evidence" (R. 382).

Appellants agreed that the court's power in passing upon a proposed consent judgment is limited either to approval or disapproval of what is submitted (R. 372). Despite the Government's considered judgment that the proposed judgment was "the best that can today be devised and framed" (see R. 343, 666), appellants stated that they hoped that the Government would propose some different judgment over ASCAP's objection (R. 382-383). Judge Ryan pointed out that a contested application by the Department of Justice for further relief, in a case in which there had been no trial but merely a consent judgment, would require a full trial of the antitrust issues (R. 405).\*

Appellants' motion to intervene was denied orally (R. 295-296, 381-382), and a formal order was entered on November 16, 1959. The grounds for denial were set forth in the order:

"Having found that representation of the public and the applicants by the Department of Justice was adequate and in the public interest; that applicants are members of and are represented by the Society with their consent; that applicants have permitted this cause in which they are not named as parties to proceed to judgment; and that it would not promote the interests of the administration of justice to permit the required intervention. . . ."  
(R. 489-490)

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\* It is clear that appellants wanted a judgment containing provisions not sought in the 1941 complaint and not covered by the prior consent judgments (see R. 256-258, 372).

After the vote to which appellants subscribed but which turned out to be adverse to them, appellants again urged the Court to reject the judgment in the hope that the Department of Justice and ASCAP would negotiate a consent decree more to appellants' liking (R. 571-572), and appellants renewed their motion to intervene, which was again denied (R. 576).

Appellants' suggestion drew the comment of Mr. O'Donnell that the vote of the membership "has completely exploded that myth that we heard so much of in October, that this proposed judgment did not represent the will of ASCAP but merely the will of the Board of Directors. I do not see how any responsible person can ever urge that again after the results [of the voting]" (R. 586).

Appellants did not file their notice of appeal from the November 16, 1959 order denying intervention until after the tabulation of the votes seven weeks later and after the amended judgment had been entered. Appellants took no appeal from the further amended final judgment, nor did they appeal from the denial of their renewed motion to intervene of January 7, 1960 (R. 714-717).

## **SUMMARY OF ARGUMENT**

### **I.**

An appeal does not lie solely from an interlocutory order denying intervention in an action under the antitrust laws brought by the United States. Section 2 of the Expediting Act, upon which appellants rely for jurisdiction, permits appeals only from "the final judgment of the district

court" in the action (32 Stat. 823, as amended, 15 U.S.C. § 29). *United States v. California Cooperative Canneries*, 279 U. S. 553; *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U. S. 137.

Cases arising under other statutes and governed by Section 1291 of 28 U.S.C., permitting appeals "from all final decisions" of district courts, furnish no precedent for appeals under the deliberately different language of statutes such as the Expediting Act, which permit appeals "only from those final judgments which terminate an action." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 545.

Where the appeal from an interlocutory order is delayed until after entry of the final judgment, and no appeal is sought from the final judgment because its provisions do not injure appellants, the interlocutory order presents only a moot question. *Cf. Sutphen Estates, Inc. v. United States*, 342 U. S. 19. This is particularly true where, as here, appellants have deliberately permitted the time to appeal from the final judgment to expire on March 7, 1960 without appealing from it or filing any assignment of error with respect to that judgment.

## II.

Intervention was properly denied pursuant to Rule 24(a) (2). Judge Ryan found that representation of the public and the appellants by the Department of Justice was adequate and in the public interest; that appellants are members of and were represented by the Society with their consent; that appellants permitted this cause in which they were not named as parties to proceed to judgment; and

that it would not promote the interests of the administration of justice to permit the requested intervention.

Appellants' motion to intervene did not comply with Rule 24(c) requiring that it be accompanied by a pleading setting forth the claim or defense for which intervention was sought. Appellants, members of the defendant Society, did not seek to assert any defense on behalf of the Society. Nor did appellants seek to assert any claim against their Society, admitting in the District Court that only the United States could assert a claim in an antitrust action brought by the United States (see R. 369, 372-373, 405; see also App. Br. 63, 65-67).

Appellants are not bound by the judgment in this action, which does not run against them and does not bar them from litigating any claims they may have in a subsequent proceeding. *Sutphen Estates, Inc. v. United States, supra*. Nor do appellants consider themselves bound; appellant Pleasant Music Publishing Corp. is a plaintiff in a pending action against ASCAP in a New York state court attacking, as it does here, ASCAP's voting system and its distribution of receipts among its members. *Leingsfeldér v. Cunningham*, Index No. 13344-1957 (N. Y. Sup. Ct. N. Y. Cty.).

### III.

If they were permitted to intervene as parties, the consent of these three appellants would be necessary before the Court could enter the amended judgment consented to by the plaintiff United States, and by the defendant ASCAP after approval by the vote of its membership. Appellants do not deny that, if permitted to intervene, they



would have ousted the District Court of power to approve the proposed consent judgment, irrespective of its merits, by merely withholding their own consent. The consent decree procedure, which the Congress has favored, could thus be nullified by any single member of any unincorporated association if he were permitted to intervene on the mere assertion that he is dissatisfied with being represented by the existing parties to the action. Appellants themselves admit that "none will ever expect that all of the members of the Society will agree" (R. 574).

#### IV.

Appellants made no showing of facts to support their motion for intervention, which was unsupported by affidavits. Appellants' factual assertions in their brief in this Court are either without record citation whatsoever or are referenced to appellants' own statements submitted to a Congressional subcommittee and which they lodged with the Clerk of this Court, or to the statements in their own memoranda below, which are not proof of the assertions they may contain. Despite appellants' repeated statements that they offered in the District Court to prove their various assertions as facts, they made no offer of proof.

The District Court's findings on the motion to intervene cannot be reversed by appellants' citing their unproved assertions of facts not properly before either court. If appellants had any probative evidence to support their assertions, it could have been embodied in affidavits supporting their motion to intervene.

The ASCAP Board of Directors represented the societal interest of the entire membership of the Society.

Epithets such as "dominating members" cannot disguise the fact that the so-called top ten publishing groups were represented on the Board by only six\* out of the 24 directors who unanimously approved the action taken, or the fact that the amended judgment was approved by a large majority of the members voting in a secret vote taken under the auspices of the District Court and endorsed by appellants.

Although appellants stated in their Jurisdictional Statement (p. 13) that this appeal involves no issues of fact, they have attempted to create such issues by repeated assertion (without evidence) of unlawful and improper conduct by "the dominating members" (*e.g.*, App. Br. 38). Although these statements in appellants' brief are admittedly irrelevant to their appeal, it is necessary to correct at least enough of them to avoid the prejudice they might otherwise create.

## ARGUMENT

### I.

**The order denying intervention is not appealable as "the final judgment" in the action.**

Appellants' motion to intervene was denied by order dated November 16, 1959. Appellants waited until after the entry of the final judgment on January 7, 1960 and then filed a notice of appeal only from the order denying intervention and not from the final judgment itself. Appellants do not claim to have been aggrieved by the provisions of the amended final judgment and do not seek its reversal.

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\* Compare list of publisher directors (R. 281) with list of top ten publisher groups (R. 274-276).



Under these circumstances, the appeal should be dismissed because, *first*, the order denying intervention is not separately appealable, and *second*, appellants present only a moot question as the motion in connection with which they sought intervention has been finally determined and the time for appeal has been permitted to expire.

Appellants rely upon Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. §29, as authorizing their attempted appeal. This section provides:

"In every civil action brought in any district court of the United States under [the antitrust laws], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

By permitting appeals in such cases only from "the final judgment" of the district court, "Congress limited the right of review to an appeal from the decree which disposed of all matters . . . and it precluded the possibility of an appeal . . . from an interlocutory decree." *United States v. California Cooperative Canneries*, 279 U. S. 553, 558. Accordingly, in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 545-546, this Court distinguished between appeals from "all final decisions" of district courts authorized by 28 U.S.C. §1291, and cases where the Congress has allowed appeals "only from those final judgments which terminate an action." The Expediting Act is of the latter type. Therefore, the appeal should be dismissed, as the order appealed from concededly was not "the final judgment which terminate[d the] action."

Appellants, however, assert that the Expediting Act permits their appeal from an order denying intervention apart

from an appeal from the final judgment of the district court. They argue that, both under the Expediting Act and the general appeals statute, the proper distinction is between denial of intervention as of right under Rule 24(a) and denial of permissive intervention under Rule 24(b), and assert that an appeal is permitted in the former case but not in the latter. (App. Br. 19)

This distinction avoids the issue. The question under the Expediting Act is whether an appeal from an order denying a motion to intervene under Rule 24(a) will lie separately and apart from an appeal from the final judgment.

Appellants would read their distinction into *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U. S. 137, asserting that "in affirming the denial of intervention as of right, this Court sustained its jurisdiction to entertain such an appeal" (App. Br. 20). This Court did not "affirm" the order denying intervention but dismissed the appeal. 322 U. S. at p. 143. Nor did the Court find that it had jurisdiction of the appeal apart from an appeal from the final judgment; the statement in the Court's opinion that it had entertained the appeal in *Missouri-Kansas Pipe Line Co. v. United States*, 312 U. S. 502, and distinguishing that case, cannot be read as a statement that the Court sustained its jurisdiction to entertain the appeal in *Allen Calculators*. 322 U. S. at p. 141.

The opinion in *Allen Calculators* fully supports the rule that no appeal lies under the Expediting Act except an appeal from the final decree on the merits:

"The record shows that the District Court had entered a final decree on the merits of National's

petition prior to allowing the present appeal; and, if we treat the appeal as taken from that final decree, as we think is required by the Expediting Act,<sup>5</sup> and as attacking that decree because the appellant had been wrongfully denied intervention, we should have to affirm the judgment since it is not shown that the District Court abused its discretion in denying intervention.<sup>6</sup>" (322 U. S. at pp. 142-143)

<sup>5</sup> *United States v. California Canneries, supra.*

<sup>6</sup> *Id.*, cases cited p. 556.

Appellants next cite *Sutphen Estates, Inc. v. United States*, 342 U. S. 19, for the proposition that an order denying intervention as of right is appealable. That proposition is not at issue here. The question here is whether such an order is separately appealable under the Expediting Act apart from the final judgment which terminates the action. In *Sutphen*, the appeal was from both the court's final judgment and the order denying intervention.

Appellants next discuss *Missouri-Kansas Pipe Line Co. v. United States*, 312 U. S. 502, which did not involve Rule 24 at all. 312 U. S. at p. 508. There, a judgment had previously been entered and jurisdiction reserved to permit Panhandle to "become a party hereto for the limited purpose of enforcing the rights conferred by Section IV hereof." 312 U. S. at p. 507n. As this Court pointed out, it was not "dealing with a conventional form of intervention" (312 U. S. at p. 506) and, "since the protection afforded Panhandle by Section IV of the decree could only be secured by the remedy designed by Section V, to wit, active participation in the suit, the denial of that protection is a definitive adjudication, and so appealable. . . .

[E]nforcement of this protection . . . is a vindication of the decree." 312 U. S. at p. 508.

That situation bears no resemblance to an application to intervene under Rule 24 in derogation rather than vindication of the prior judgment (see pages 40-41, *infra*), and where the applicant for intervention could, as in *Sutphen Estates v. United States*, *supra*, file a notice of appeal from both the order denying intervention and the final judgment itself.

*California Cooperative Canneries*, *Allen Calculators*, and the *Pipe Line* case are cited in Wolfson & Kurland, *Jurisdiction of the Supreme Court of the United States* (1951), for their statement, referring to the Expediting Act:

"But where the denial of a motion to intervene is urged as error in an appeal from the final decree the appeal will lie, but only to the Supreme Court, even though the intervenor is the sole appellant and the only error urged is the denial of the intervention." (at pp. 306-307).

This is precisely the point here: a separate appeal will not lie from an order denying intervention when no appeal is taken from the final decree.

Appellants next seek to distinguish *California Cooperative Canneries*, *supra*, where this Court stated that an appeal would not lie except from a judgment "which disposed of all matters", by pointing out that the Court in that case (279 U. S. at p. 557) cited *Collins v. Miller*, 252 U. S. 364. *Collins v. Miller* was not an antitrust action and was cited because it announced the general proposition that

"A case may not be brought here by appeal or writ of error in fragments. To be appealable the judg-

ment must be not only final, but complete. [cases cited] And the rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all of the causes of action involved." (252 U. S. at p. 370)

The opinion in *California Cooperative Canneries* does not embrace the statement in *Collins v. Miller* of the exception to this rule under other appeal statutes.

"The seeming exception to this rule by which an adjudication final in its nature of matters distinct from the general subject of the litigation, like a claim to property presented by intervening petition in a receivership proceeding, has been treated as final so as to authorize an appeal without awaiting the termination of the general litigation below [cases cited] has no application here." (252 U. S. at pp. 370-371)

*Credits Commutation Co. v. United States*, 177 U. S. 311, 316, also cited by appellants, is to the same effect.

However, the sole exception noted in *Collins v. Miller*, *supra*, even if applicable under the Expediting Act, has no more application here than in *Collins v. Miller*, particularly since appellants "await[ed] the termination of the general litigation below" before appealing.

Appellants also cite *Brotherhood of Railroad Trainmen v. B. & O. R. Co.*, 331 U. S. 519. This was not an antitrust action and did not involve the Expediting Act. An absolute and unconditional right to intervene had been granted by Section 17(11) of the Interstate Commerce Act (54 Stat. 916, 49 U.S.C. §17(11)), and the case was decided in the context of entirely different statutes which did not limit

appeals to "the final judgment", but permitted appeals from "a final judgment or decree . . . in cases specified in section 44 of this title". Section 210 of the Judicial Code of 1911, 36 Stat. 1150, as amended, 28 U.S.C. §47a (1946).

Thus, none of the cases cited by appellants limits the applicability to this case of the holding in *California Cooperative Canneries, supra*, that the Expediting Act, in order to expedite civil antitrust actions instituted by the United States, "limited the right of review to an appeal from the decree which disposed of all matters . . . and it precluded the possibility of an appeal . . . from an interlocutory decree." 279 U. S. at p. 558.

Nor do appellants offer any reason why their appeal solely from an order denying intervention should not be dismissed as moot when they did not appeal from the final judgment which had already been entered before they filed their notice of appeal, and when appellants concede that the changes made by the amended final judgment, as compared to the prior judgment, were improvements.

Appellants suggest only that, if now permitted to intervene, the District Court might entertain a motion "made by appellants or perhaps the Government—to vacate the judgment of January 7, 1960, and to conduct further proceedings to modify the antitrust decree." (App. Br. 22) There would be no reason for the Government to make such a motion; it is already on record that the present judgment is "the best that can today be devised and framed" (R. 343, 666). Appellants do not claim that they—who were not parties to the 1950 judgment—have any standing to institute proceedings to modify the 1950 consent judgment.



## II.

**The District Court correctly denied appellants' motion to intervene.**

Intervention is the procedural device

"whereby a stranger can present a claim or defense in a pending action or in a proceeding incidental thereto and become a party for the purpose of the claim or defense presented." 4 Moore, Federal Practice, par. 24.02, at p. 6 (2d Ed. 1950)

Appellants' motion to intervene as of right under Rule 24(a)(2) was properly denied because they failed to satisfy the requirements of that Rule that they show both (1) that representation of their interest in the action by existing parties "is or may be inadequate" and (2) that they "[are] or may be bound by a judgment in the action."

Moreover, appellants did not seek, as required by Rule 24(c), to intervene to assert any justiciable "claim or defense". They were not "defending" the defendant Society against a proposed consent judgment, which they conceded was an improvement over the existing judgment. They did not seek to present a claim against the Society, and do not contend that they could legally assert any such claim in an antitrust action brought by the United States.

In fact, under the specific terms of the 1950 judgment (R. 47), the Court could not allow appellants to intervene as parties because to do so would disregard the intentions of the parties when they consented to the prior judgment.

**A. Representation of the public and the appellants by the Department of Justice was adequate and in the public interest.**

The first of the District Court's findings on appellants' motion to intervene was that "representation of the public and the applicants by the Department of Justice was adequate and in the public interest." (R. 489) Appellants offered no proof to support their contention that the Department's representation was not adequate. Their quarrel with the Court's finding was best summarized in their memorandum to the District Court prior to the hearings:

"It goes almost without saying that the Department cannot be said adequately to represent the interests of applicants when it has already rejected their proposals and is advocating contrary positions of its own." (DR. 287)

We leave to appellee the United States the briefing of their representation of the interests of the members of the Society and the general public. We point out, however, that the District Court's finding was consistent with decisions denying earlier attempts at intervention in the instant case:

"The protection of the public interest rests upon those officials whose special responsibility and duty it is to enforce the laws. To permit intervention by private citizens, whose purpose in the main is self interest in proceedings instituted by the Government is more likely to hinder rather than help in the enforcement of laws." *United States v. ASCAP*, 11 F.R.D. 511, 513 (1951).

"Since the Government is the complainant in suit, the conduct and control of this litigation should be free from interference by private citizens. I am



satisfied from a reading of the papers before me that the actions of the Department of Justice . . . indicate that it did adequately represent the interests of the petitioner." *United States v. ASCAP*, 23 Fed. Rules Serv. 24a.51, Case 1 (1956)

The Department of Justice was representing the interests of the general public and of the 6,457 members of ASCAP. It was the Department's responsibility to accommodate these varying interests to achieve the best result for all of them. We note that appellants are three out of the 1,365 publisher members of ASCAP.\* No writer members have joined in the appeal.

**B. The societal interests of the membership were properly represented by the Society.**

Appellants' argument that they were inadequately represented by the Society is irrelevant in the context of the purpose for which they sought intervention, *i.e.*, to promote their own individual interests by sponsoring action against the Society of which they are members.

The order denying intervention was entered during the recess of the hearings in the District Court taken in order to permit the vote of the membership.

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\* Appellants repeatedly refer to themselves—even in their statement of the question presented (App. Br. 4)—as "smaller members." Appellants have lodged with the Clerk documents in which appellant Sam Fox Publishing Company, Inc. is depicted as one of the "larger publishers" in the Society:

"Mr. Roosevelt. As one of the larger publishers, can you give any particular reason why you have never been elected to the board?"

Mr. Fox. I believe that is probably due to the fact that there have been some differences of opinion, over the years, between my father, and more recently myself, and the present board of directors." (ASCAP Hearings, p. 335; see also R. 278)

In its order, the District Court found that appellants were represented by the Society with their consent (R. 489). Appellants do not quarrel with the finding but state that the conclusion that appellants could therefore not intervene on the ground that they were inadequately represented by the Society "is at odds with a long line of decisions." (App. Br. 32). Yet, appellants cite no decision "at odds" with that of the District Court. Cases cited from the field of corporate law present very different questions. There, intervention was sought by the stockholder to assert a claim or defense on behalf of his corporation on the ground that the claim or defense was not adequately being presented by the corporation.

Appellants here sought to assert no claim or defense on behalf of their Society. They were not seeking to avoid the imposition of a further judgment against the Society or to assert any defense which the Society failed to assert. They were certainly not seeking any relief on behalf of the Society, which was the defendant in the action.

Instead, appellants were seeking to intervene solely for the purpose of trying to persuade the plaintiff, the United States, to seek relief *against* the Society of which they were members (R. 372-373, 383). Thus, in effect, they were seeking to intervene as a party plaintiff in an action where their Society was a defendant. None of the cases cited in their brief bears any resemblance to this situation.

With respect to their societal interest in a judgment which would best serve the Society by a proper accommodation of the equities of all the members, appellants were adequately represented by the Society.

Before entering the amended judgment, Judge Ryan assured himself that the societal interest of the membership as a whole, including appellants, was adequately represented by the Society. The proposed judgment was submitted to a vote—with appellants' endorsement (R. 476)—and approved by a majority vote of the membership. Judge Ryan ordered that, in addition, the membership vote be tabulated according to size classes so that he could see how members of various classes voted (R. 507-508). A majority of the members voting in each of the eight classes of writer members and each of the six classes of publisher members approved the action taken by the Society in consenting to the judgment.\*

**C. Appellants are not "bound" by the further amended judgment.**

Appellants agree that they had no right to intervene if they are not bound by the judgment of January 7, 1960.

\* The percentage distribution of votes cast in each of these classes was as follows (Ex. H, R. 655, 556):

*Writer Members*

Non participating	61%	in favor of the Judgment			
Participating with 1 vote	58%	"	"	"	"
" 2 to 5 votes	57%	"	"	"	"
" 6 to 25 "	70%	"	"	"	"
" 26 to 50 "	75%	"	"	"	"
" 51 to 100 "	80%	"	"	"	"
" 101 to 250 "	80%	"	"	"	"
" over 250 "	88%	"	"	"	"

*Publisher Members*

With 1 vote	56%	"	"	"	"
With 2 to 3 votes	59%	"	"	"	"
" 4 to 5 "	64%	"	"	"	"
" 6 to 10 "	70%	"	"	"	"
" 11 to 20 "	67%	"	"	"	"
" over 20 "	75%	"	"	"	"

Since appellants were not parties to that judgment, and the judgment does not direct them to do or to refrain from doing anything, clearly they are not bound by its terms.

Therefore, if appellants are "bound", it must be because the January 7, 1960 judgment is *res judicata* of the claim or defense they attempted to assert by intervention. *Sutphen Estates, Inc. v. United States*, 342 U. S. 19.\* At the outset, however, appellants are faced with the difficulty that they asserted no justiciable claim or defense, and, in fact, nowhere in their brief do they specify the claim or defense they sought to assert.

Appellants sought to assert no defense to the entry of an amended judgment. Rather, they were urging that some additional or different injunctive provisions be included in the judgment against their Society. Appellants claim, in effect, that as members of the "group . . . on whose behalf the Department of Justice purported to act" (App. Br. 17), they will be bound because the United States did not obtain precisely the relief appellants wanted. However, they do not claim to be "bound" as members of a "class" represented by the plaintiff, the United States.

Appellants' argument falls unless they can show that, when the United States seeks and obtains a judgment in an antitrust action brought by it under Section 4 of the Sherman Act (26 Stat. 209, 15 U.S.C. §4), others are

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\* In *Sutphen*, this Court held that a lessor was not bound by an antitrust judgment which required the dissolution of the company guarantying the lease and substituted another guarantor, on the ground that the antitrust judgment would not be "*res judicata* of the rights sought to be protected through intervention." 342 U. S. at p. 21.

precluded by the application of *res judicata* from later asserting different claims in an action brought by them to enforce a private antitrust claim under Section 16 of the Clayton Act (38 Stat. 737, 15 U.S.C. §26).

Appellants' argumentation is quite different. They assert that this is a class action against an unincorporated association. They then seek to align themselves with the defendant ASCAP just long enough to claim that they are bound as members of the defendant class and to assert that a judgment in a class action is *res judicata* against all members of the class. They conclude that as members of the defendant Society against whom the judgment was entered, the judgment will be *res judicata* in a subsequent action in which appellants are plaintiffs against their Society.

This analysis must fail because, first, this is not a class judgment and, second, even if it were, appellants would not be bound by the judgment in a subsequent action in which they are suing their Society.

Appellants rely upon *Supreme Tribe of Ben-Hur v. Cauble*, 255 U. S. 356, for the proposition that "any judgment entered for or against the representatives of a class . . . would be *res judicata* as to all members of the class" (App. Br. 60). In attempting to apply that proposition to this case, however, appellants refer only to the complaint and ignore the terms of the judgment.

Although the 1941 complaint had intimations that a class action may have been intended, the judgment itself ran not against the members as a class, but against the Society and those acting on its behalf (R. 28). The amended judgment of March 14, 1950, which entirely replaced the 1941

judgment, runs only against the Society (R. 35-48), except for the single provision, not relevant here, prohibiting officers and directors from participating in or voting on questions relating to transactions between ASCAP and licensees in which they have an interest (R. 44). The further amended judgment of January 7, 1960 runs solely against the Society and not against its members (R. 667-680).

These judgments make clear that this action was maintained as a suit against the Society itself as a juridical entity, as contemplated by Section 8 of the Sherman Act (28 Stat. 210, 15 U.S.C. §7) and Section 1 of the Clayton Act (38 Stat. 730, 15 U.S.C. §12); see also Rule 17(b) of the Federal Rules of Civil Procedure; *Sperry Products, Inc. v. Association of American R.R.*, 132 F. 2d 408 (2d Cir. 1942).

Even assuming, *arguendo*, that this may loosely be described as a class action, appellants cite only *Supreme Tribe of Ben-Hur v. Cauble*, *supra*, for their assertion that they would be bound by the judgment. That case demonstrates another basic fault in appellants' argument. In *Cauble*, one group of members sued their unincorporated association to enjoin certain conduct, and lost. Another group of members brought a similar subsequent action and were held to be barred because their interests were the same as the plaintiffs' in the first action. Appellants suggest no factual parallel to our case.

In fact, appellants argue strenuously that their interests were not identical with those of the other members of the Society, and their entire brief is an attempt to divide the membership into antagonistic groups.



This points up the fatal inconsistency in appellants' argument. Appellants argue that they were not adequately represented by either the plaintiff or the defendant in this action, and also argue that they would be bound by the judgment because it is a class action. In *Hansberry v. Lee*, 311 U. S. 32, this inconsistency was held to be dispositive. That was a suit to enforce a restrictive covenant. A defense of invalidity of the covenant was met by a plea of *res judicata*. The Supreme Court of Illinois upheld the plea on the basis of a decree in an earlier class action holding the restrictive covenant to be valid. Relying on the due process requirements of the Constitution of the United States, this Court held that the prior decree could not be *res judicata* because the "selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." 311 U. S. at p. 45.

Appellant Pleasant Music Publishing Corp., has demonstrated its belief that it is not bound by the 1950 judgment against ASCAP. In an action entitled *Lengsfelder v. Cunningham*, Index No. 13344-1957 (N. Y. Sup. Ct. N. Y. Cty.), it asks the New York court for relief against ASCAP's weighted voting system as well as other relief in areas covered by the 1950 judgment. Consistently, ASCAP has not there asserted a defense of *res judicata* based on the 1950 decree in this case.

The argument that appellants are bound also ignores the fact, as stated by Chief Judge Ryan in his opinion, that the 1960 amended judgment "does not foreclose further steps to accomplish and achieve further improve-

ments when they appear to be either necessary or desirable" (R. 469). This judgment is still subject to the jurisdiction of the court to interpret or modify at the behest of the Department of Justice or the Society.

Moreover, in the area of the Society's survey of performances, the judgment does not preclude the Society from doing precisely what appellants desire, *i.e.*, having the survey conducted by an outside agency (see R. 668).

The judgment does not prevent the Society from doing precisely what the appellants desire with respect to the weighting formula, *i.e.*, ASCAP is permitted, but not required, to make distinctions in the credit awarded to various works for similar non-feature uses (R. 690).

The judgment does not prevent the Society from allocating votes on a *per capita* basis (R. 674) as suggested by appellants (see App. Br. 55n.).

All that appellants can even claim to be *res-judicata* is that the membership of the Society has not been precluded from choosing between what the majority of the members now want and what the appellants have been seeking.\*

**D. Appellants have permitted this cause in which they are not named as parties to proceed to judgment.**

Judge Ryan found that one of the factors barring the application for intervention was the entry of the prior decree (R. 489), which was entered at a time when appellants were all members of the Society (App. Br. 5n.).

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\* If the 1960 judgment is *res-judicata* and were vacated, appellants would find themselves with the 1950 judgment which they like even less and which, if appellants are consistent, would then be *res-judicata*.

The 1950 decree (which entirely replaced the 1941 decree (R. 36)) provided for the retention of jurisdiction for the purpose of enabling the parties to apply for further orders and directions (R. 47). A further specific provision provided that, after five years, the plaintiff might apply for modification of the judgment in any respect (R. 47-48). Appellants do not contend that they were parties to the 1950 judgment, which was entered without objection by them although they were members at the time. Under those circumstances, to allow appellants to intervene to urge a modification of the 1950 consent judgment would contravene the provisions of that judgment.

"[I]ntervention will not be allowed for the purpose of impeaching a decree already made." *United States v. California Cooperative Canneries*, 279 U. S. at p. 556.

See also *United States v. Radio Corporation of America*, 186 F. Supp. 776 (E. D. Pa. 1960), appeal dismissed *sub nom. Westinghouse Broadcasting Co. v. United States*, 5 L. Ed. 2d 264, where an antitrust consent decree similarly reserved jurisdiction to permit the United States to apply to the court for further orders and the court held that it could not later allow a non-party to intervene.

**E. It would not have promoted the interests of the administration of justice to have permitted the requested intervention.**

The record adequately justifies the finding of the District Court that intervention would not have promoted the interests of justice. By 1956, the Department of Justice had begun its study which ultimately led to the 1960 amended judgment (R. 304). Judge Ryan's familiarity

with the situation dates back at least to his denial in 1956 of a prior motion by other members to intervene, in the course of which he stated that he was satisfied that the Department of Justice was adequately representing the interests of the members.\*

The course of proceedings in connection with the proposed amended judgment furnished ample basis for Judge Ryan's finding that intervention would not promote the interests of justice. Moreover, Judge Ryan conducted the hearings in such fashion that the views of all of the members could be adequately expressed and their interests protected. Thus, appellants were given more than three months' notice of the hearing and invited to participate as *amici curiae* (R. 75-76). The Judge read not only their memoranda but also the hearings before the Congressional subcommittee (R. 469). Because of appellants' assertion that the proposed judgment did not have the consent of the membership at large, Judge Ryan suggested, and appellants endorsed, a membership vote to determine this question. The judgment was not entered until after it had been approved, in a secret ballot under the supervision of the Court, by a large majority of the members voting.

Under these circumstances, to have permitted intervention would have taken from the 6,454 other members of the Society the right to approve the proposed consent judgment if the three appellants vetoed it (see Point III, *infra*).

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\* *United States v. ASCAP*, 23 Fed. Rules Serv. 24a,51, Case 1 (1956), *supra*.

#### **F. Intervention was properly denied.**

If the appeal is not dismissed as unauthorized by the Expediting Act, the order of the District Court should be affirmed (i) because appellants satisfied neither of the two requirements of Rule 24(a)(2), *i.e.*, a demonstration that representation by existing parties is inadequate, and a demonstration that appellants would be bound by the judgment, and (ii) because appellants were not attempting to assert a claim or defense as required by Rule 24(c).

### **III.**

#### **Appellants sought intervention as a means of ousting the District Court of jurisdiction to approve the proposed consent judgment.**

A decision that appellants were entitled to intervention as of right would have had to be predicated on a finding that appellants would be bound by the judgment against the Society.\* In that circumstance, no consent judgment could be entered except upon the consent of the intervenors, and, by withholding their consent, they could exercise a veto over the entry of the proposed consent judgment.

Intervention was not necessary to accomplish the purported purpose of intervention, *i.e.*, to persuade the Government to seek relief more to appellants' liking. Therefore, the only real effect of the intervention sought would have been to permit appellants to veto the consent judgment and oust the District Court of jurisdiction to enter

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\* As pointed out above, no such finding is permissible as the judgment runs only against ASCAP and has no *res judicata* effect on the appellants.

the proposed consent judgment despite the Court's approval of it and despite the consent of the United States and of the defendant with the approval of the majority of its membership.

If appellants, as three of the 6,457 members of the Society, could intervene and obtain a veto power, the same right would necessarily be available to any of the other members. In view of the large number of members of the Society and the differing size, nature and popularity of their catalogues, there could never be a plan that would satisfy everyone. For example, those members who contribute the most valuable musical compositions performed by the licensees of ASCAP might veto a judgment which did not permit them to obtain a share of the royalties commensurate with the value of their contribution. Others might veto any proposal which did not pay each member a share of the royalties, irrespective of his contribution to the overall ASCAP catalogue. For example, Mr. Lengsfelder (of appellant Pleasant Music) had suggested that a percentage of the Society's revenues be distributed solely on the basis of length of membership, whether or not the member had a single musical composition which any licensee had ever played (ASCAP Hearings, p. 390).\*

It would be impossible to devise a judgment that would escape the veto of at least one of the members if mandatory

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\* ASCAP is required to accept for membership any composer or author who has had one work regularly published and any publisher whose musical publications have been used or distributed on a commercial scale for at least one year and who assumes the normal financial risks of publication; one can thus become a member even though no musical composition written or published by him has ever been performed by one of the Society's licensees (R. 46).



intervention required no more than a claim that the member was dissatisfied with it. Appellants concede that "no one will ever expect that all of the members of the Society will agree" (R. 574).

Appellants would make it impossible to have consent judgments in actions brought by the United States under the antitrust laws against an unincorporated association. This position flies in the face of an express Congressional design favoring consent settlements of antitrust suits. Section 5 of the Clayton Act (69 Stat. 283, 15 U.S.C. §16) provides that consent judgments or decrees entered before any testimony has been taken shall be excepted from the provision that a final judgment or decree in an action brought by the United States under the antitrust laws shall be *prima facie* evidence in an action by any other party against the defendant under the antitrust laws.

Appellants content themselves with stating the obvious, i.e., that in a litigated proceeding by the United States under the antitrust laws, the judgment after trial does not depend upon the consent of either the defendant or of intervenors. This misses the point that the District Court was not hearing a contested proceeding brought by the United States to modify a prior judgment.\* Appellants do not deny that, if permitted to intervene, they could and would have ousted the District Court of jurisdiction to approve the proposed consent amended judgment, by withholding their consent.

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\* This distinction makes irrelevant here the decisions in *Hughes v. United States*, 342 U. S. 353, and *Liquid Carbonic Corp. v. United States*, 350 U. S. 869, cited by appellants, and, indeed, appellants' entire argument at pages 63-68 of their brief.

## IV.

**Appellants' brief asserts, as facts, statements made by them *dehors* the record, while at the same time conceding that they are irrelevant.**

In their Jurisdictional Statement (p. 13), appellants stated that "no issues of fact are involved in this appeal, since no evidence was received or testimony taken by the Court below in connection with appellants' motion to intervene".

Appellants' notice of motion for intervention merely recited the statutory grounds for intervention set forth in Rule 24(a)(2) (R. 251). The motion was not supported by affidavits. Their pleading in intervention alleged that the proposed judgment should have some different provisions, but the pleading contained no relevant allegations of fact except an erroneous assertion as to the distribution of publisher votes\* (R. 252-258).

Appellants elected to make their factual assertions in unsworn memoranda. Appellants now refer to these assertions as facts in the record and further assert, as facts, their own statements (many of them disproved at the time) which they had previously submitted to a Congressional subcommittee, including such items as a minority opinion by Mr. Fox (of appellant Sam Fox Publishing Company) when he was a member of the ASCAP Board of Appeals, abridged portions of correspondence and

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\* These assertions purport to be based upon figures in the record (DR 1096n.) and are demonstrably incorrect (see pages 51-52, *infra*).

speeches, and unsworn statements of Mr. Lengsfelder (of appellant Pleasant Music).\*

Rule 24 does not specifically require that an application for mandatory intervention be accompanied by affidavit or other proof to support the allegation that the applicant's interest is not adequately represented by existing parties. It would seem, however, to require at least a preliminary showing by affidavit if the application is based upon facts not otherwise before the Court.

Appellants offered no proof in support of their application to intervene. Appellants now seek a reversal of the findings and order of the District Court by relying on disputed factual assertions outside the record.

In an apparent attempt to excuse reference to these assertions of fact, appellants repeatedly state that they made offers of proof in the District Court. They made no offer of proof on their motion to intervene. They made no offer at the hearings to prove any of the specific assertions they make in this Court which are referenced only to their memoranda below or to documents lodged with the Clerk.

A general statement that, if permitted to intervene, appellants were prepared to prove the assertions contained in over 100 pages of memoranda (R. 371) was not an offer of proof of any specific facts and does not entitle appellants to recite these assertions as proved facts. Moreover, appellants' memoranda below ignored the accepted principle that memoranda should be based upon facts in the record which, in the case of motions, would include sup-

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\* In the District Court, appellants referred to this material as "the statements and . . . the evidence, if we can call it that, adduced before the Congressional subcommittee" (R. 371).

porting affidavits. However, all of these assertions were brought to Judge Ryan's attention (see R. 63, 469), and appellants' arguments were fully heard by the Court.

Yet, although the record is clear, as Judge Ryan observed, that the Society did not admit that the purposes of the 1950 judgment were not being served (R. 663), appellee dares not leave unanswered appellants' erroneous assertions for fear that the Court might take failure to answer as an admission of their correctness.

The statement that twelve publishers were enabled to inflict unlawful competitive injury upon smaller members (App. Br. 7n.) is referenced by: (i) R. 256, appellants' pleading in intervention, which contains no such charge; (ii) R. 371, a statement of appellants' counsel which does not support the assertion in the brief; (iii) R. 381, another statement by appellants' counsel, which does not support the assertion; (iv) four pages of appellants' memorandum below, which do not charge unlawful competitive injury.

The statement that "publisher directors exercise a measure of control over the writer directors" (App. Br. 28n.-29n.) is referenced to (i) testimony of Mr. Lengsfelder before a Congressional subcommittee which is more consistent with the conclusion that writers such as Oscar Hammerstein, Cole Porter, Richard Rodgers, the George Gershwin estate, and Lerner and Lowe, can exercise a strong influence over their publishers by threatening to turn over their new works to another publisher or, as Irving Berlin does, publish their works themselves; and (ii) testimony by Mr. Hammerstein before the Congressional subcommittee denying publisher control. Yet, this assertion is central to appellants' entire case because the ten largest

groups of publisher members are represented by only six out of ASCAP's 24 directors, a fact completely inconsistent with appellants' basic argument that these publishers dominate and control the Society to the injury of the "smaller members".

By mere assertion without record reference, appellants increase the number of "dominant" directors to eight by the statement that two other publishers "have traditionally allied themselves with the ten largest publishers" (App. Br. 45). But even eight is well short of a majority, and therefore appellants' argument hangs wholly on the unsupportable assertion that the publisher directors control the writer directors and that therefore these six or eight out of the 24 directors can run the Society solely for the benefit of the "dominating members". It is therefore not surprising that, at the end of the hearings in the District Court, Mr. O'Donnell described appellants' charge as a "myth" (R. 586).

Appellants assert that there are numerous illustrations of the directors' abuse of power (App. Br. 31). Appellants' "record" references are to prepared statements of Mr. Lengsfelder (of appellant Pleasant Music) submitted to a Congressional subcommittee, and testimony before the subcommittee of (i) Oscar Hammerstein at pages 148-149 of the hearings, which does not support the contention; (ii) of Mr. Peer at page 328 of the hearings, which is contradicted at pages 625-626 of the hearings; and (iii) of Mr. Fox (of appellant Sam Fox Publishing Company) at pages 341-346 of the hearings, which is contradicted at page 628 of the hearings.

When appearing before the District Court, counsel for appellants was more careful, discussing there "eliminat[ing] the potential of damage and of wrongdoing which the dominant group has had—I don't say proven against it, but which it has been alleged by the Department of Justice to have engaged in in the past . . ." (R. 388).

Even this much milder statement is not accurate or complete. There was no allegation by the Department of Justice of damage or injury to the "smaller members", and the District Court noted that there were no admissions of fact by the Society (R. 663, 667). There were disagreements which were resolved by the consent amended judgment, particularly the provisions whereby the votes of the larger members were substantially reduced and the voting power spread more generally among the members, and whereby many decisions which previously were within the discretion of the Board of Directors were removed from their discretion by more explicit provisions of the further amended judgment.

In discussing their objection to differing weights for works used as themes or background music, appellants suggest that the rule giving greater credit to well-known songs would favor the publisher members of the Board of Directors because 360 works in which these publishers had an interest, and which received full credit under the old formula when performed as themes, would continue to qualify under the new formula (App. Br. 53). Appellants omit a very significant fact: To qualify, a work must not only have been very popular at one time, but must also continue to be popular. Appellants refer to the fact that these 360 works meet the first test, but omit to state that they



will not qualify for full credit unless they also meet the second test of having received 2,500 feature performance credits during the latest five years, not counting more than 750 in any one year (R. 691). The Department of Justice found that works qualify for full credit only on the basis of "the inherent value of the music itself" (R. 332).

We should also like to set straight the facts on the allocation of votes among the members of the Board of Directors and the ten largest publisher groups.

Under the prior system, when votes were based upon a member's contribution to the Society, the ten largest groups of publishers had 63 per cent of the votes eligible to be cast for the twelve publisher directors. Under the new judgment, the top ten publisher groups would have only 37.1 per cent of the publisher votes based upon 1958 performances, and the votes of publishers represented on the Board of Directors would be reduced from 56 per cent to 30 per cent. (R. 320-321)

On the writers' side, the votes were already widely distributed; it was necessary to add up the votes of approximately the top five per cent of the writer members, or about 250 members, to aggregate a majority of the vote for the twelve writer members of the Board of Directors (see R. 141). Under the new judgment, the votes of writer members were so widely distributed that no one was interested in the statistics.

Appellants argue that the top ten groups of publishers still control 50 per cent of the publisher votes (App. Br. 41-47). They start by ascribing 41 per cent to these pub-

lishers.\* They then add 3 per cent for Schirmer and Fisher on the unsupported assertion that they "have traditionally allied themselves with the ten largest publishers" (App. Br. 45\*\*). Appellants then assert that in the past only about 88 per cent of the votes have been actually cast, and conclude that the top ten publishers still retain 50 per cent of the vote.

Appellants then state that counsel for ASCAP refused to supply them with the per cent of the total publisher vote cast by the ten largest groups of publishers in the 1960 election for ASCAP directors and argue that no one could tell how or whether the Society was in compliance with the judgment because the ballots had been sealed and in-

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\* Under the new voting formula, ten publisher groups would have initially had 37.1% of the publisher votes. This was the result and not the precise objective of the new voting formula. It was agreed that if this percentage increased by more than 10%, i.e., exceeded 40.8%, the voting formula would be adjusted to reduce the votes of the top groups. No limitation, however, was placed on the amount by which their share of the votes could decrease. (R. 675)

Appellants argue that the 10 top groups could increase their voting percentage to 40.8% by dividing their catalogues into a larger number of companies; on the sliding scale contained in the voting formula, two companies with 100,000 performance credits each would have more aggregate votes than one company with 200,000 performance credits. This "opportunity" is equally available to appellants, who are not restricted to a 10% increase in their votes.

\*\* The 3% figure is derived from a progression of combined votes of these two companies of 3.9% in 1954, 3.4% in 1955, 3% in 1956, 2.5% in 1957, and 2.2% in 1958, and ignores completely the fact that, based on 1958 figures and the new voting schedule, their combined voting percentage would be only 1.6%. This downward progression hardly proves an "alliance" with the top ten publisher groups to "dominate" the Society for their personal advantage.

formation as to the *casting* of votes was kept secret (App. Br. 44n.).\*

The only information necessary to ascertain compliance with the judgment is the percentage of the *eligible* vote which was possessed by the top ten publisher groups. This information is available to any member and has been supplied to the Department of Justice. The top ten publisher groups, in the latest election, had only 31.88 per cent of the eligible votes, and Schirmer and Fisher together had only 1.5 per cent.

At the hearing before Judge Ryan, appellants attempted to belittle the provision that one-twelfth of the publisher members could elect one of the twelve publisher directors by petition, and they asserted that this would never happen (R. 378). However, in the very first election, two directors were elected by the petition method (App. Br. 48n.). Appellants now argue that Mr. Morris represented one of the ten largest publisher groups (App. Br. 48n.), ignoring the fact that, despite being among the top ten, Mr. Morris had not previously been a director of ASCAP and did not become a director until the petition method was made available.\*\* The top ten groups are not a monolithic front, but have the same "conflicting economic interests" as appellants ascribe to the next largest group (App. Br. 48n.), of which appellant Fox is a member (R. 278).

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\* Compare appellants' concern at the hearing for the secrecy of the ballot (R. 378) and the Society's assurance that secrecy would be preserved (R. 466).

\*\* See R. 285-289, which shows the names of directors back through 1941.

Nor can the election by petition of Mr. Goodwin be brushed aside merely because he was being re-elected. To the extent that the top ten publisher groups used their votes to elect either Mr. Morris or Mr. Goodwin by petition, they decreased even further their percentage of votes in the general election which followed (R. 676).

These and similar statements in appellants' brief cannot obscure the fact that the amended judgment was approved by all of the Society's 24 directors and by the membership at large in a vote taken pursuant to the direction of the District Court.

### CONCLUSION

**For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed or, in the alternative, that the order of the District Court denying intervention should be affirmed.**

Respectfully submitted,

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